DOCUMENT RESUME

ED 259 332 EA 017 792

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TITLE Legal Protection for School Children: Separating Psychological Abuse from Physical Abuse.
PUB DATE 85
NOTE 21p.
PUB TYPE Legal/Legislative/Regulatory Materials (090)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Child Abuse; Corporal Punishment; *Court Litigation; Discipline; Elementary School Students; Elementary Secondary Education; Emotional Problems; Grade 1; School Law; Student Rights; *Teacher Behavior; Teacher Student Relationship; Torts
IDENTIFIERS *Psychological Abuse

ABSTRACT

The inflicting of emotional distress, mental distress, or mental injury on another person constitutes psychological abuse, whether or not accompanied by physical harm. If intentional psychological abuse causes harm, it could be actionable as a tort. While the latitude allowed teachers in selecting teaching methods may make the intentionality of abuse difficult to determine, professional negligence may also be charged. In either case proof is difficult to establish. Resolving a West Virginia case in which 15 first-grade students accused a teacher of tying them up with rope and taping their mouths involves, first, determining the relationship between the children's physical complaints and the teacher's actions and, second, establishing the credibility of the children through an appropriate form of examination. The extent to which students are accorded legal protection from psychological abuse may be comparable to the extent of their protection from physical or other forms of punishment in the school environment. Verbal abuse of students and immoral conduct may be actionable to a similar extent. (PGD)

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Legal Protection for School Children: Separating Psychological Abuse from Physical Abuse

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1985

EA 012 792

Abstract

The article defines psychological abuse in school settings, describes legal aspects of the problem, particularly with respect to possible action in negligence. The professional knowledge base of teacher verbal behavior is discussed as a condition for possible tort action or dismissal of teachers who intentionally or negligently abuse students psychologically. Finally, a cultural-professional-legal rationale for child abuse is discussed.

Legal Protection for School Children:
Separating Psychological Abuse
from Physical Abuse

Educating Americans is an exercise that grows even more complex. It has long been too great a task for the allied fields of education and psychology to handle alone. They have been co-starring in this classic American drama with yet another distinguished and veteran discipline - The Law. Educators, psychologists, and lawyers will surely be called upon to direct more of their professional attention to a public concern that has been taking root in the common ground they share. The concern is over damages sustained by elementary and secondary school students as a result of being psychologically abused by teachers and other school personnel (Lynch, 1984).

On February 25, 1985, USA Today ran a story about civil charges being brought against a first grade teacher in a West Virginia public school. The teacher has been accused of tying up 15 first-graders with rope, taping their mouths, and verbally abusing them. What makes the case especially significant is that the charges brought by the parents center on psychological abuse instead of on corporal punishment.

Parents of the first-graders taught by the accused teacher told state welfare officials that it wasn't until recently that they learned the reasons for their children's perplexing behavior; since last school year these children have been refusing to go to school, developing headaches and stomach pains, and wetting their beds. One six-year-old girl reportedly would tie up her dolls and put tape across their mouths. Eventually the parents began discussing these behaviors among themselves and finally notified officials. The children told investigators that their teacher had warned them "not to be tattle-tales." A Temple University psychologist retained by the parents and state welfare officials interviewed the children and stated that their experiences have amounted to "a psychological holocaust." The teacher denies all charges and claims that the parents have conspired against her because last year she flunked a quarter of her class for poor performance. She also feels that the parents are being carried away

with the current popular interest in the topic of child abuse. However, the Assistant Attorney General who has been investigating the case for the state of West Virginia said, "The stories speak for themselves, I can't believe 15 parents conspired to get 15 children to lie."

This case is surrounded by some difficult and disturbing issues. Because West Virginia is one of the few states in which the practice of corporal punishment in schools is illegal, and because a teacher can be dismissed by a school board, it is remarkable that civil charges filed by the parents focus on psychological abuse rather than corporal punishment, that they are asking only that the teacher be removed from the classroom, and that a Fayette Circuit Court judge is involved in determining whether civil charges should be heard by him or the local school board.

Should this action result in a trial, and the parents win their suit, this case well surely serve as a precedent. To appreciate this it is only necessary to consider how difficult it is for educators, psychologists, and lawyers to work with the concept of "psychological abuse." For various reasons, this concept is threatening.

Psychological Abuse as a Tort

We hold that the inflicting of emotional distress, mental distress, or mental injury on another person constitutes psychological abuse. These terms will be used interchangeably so as to keep with tradition. The elements of psychological abuse include harm caused by one responsible person's action to another, with or without accompanying physical harm.

According to Simon (1982) "a tort is a civil or private wrong based on the general principle that every act of man that causes damage to a legally protected interest of another obliges him, if at fault, to repair it" (p. 6). There are several areas of tortuous harm which could result from questionable psychological practices-negligence, intentional interference, battery, infliction of mental distress, defamation, invasion of

privacy, and misrepresentation (Schwitzgebel & Schwitzgebel, 1980). According to the 1947 Restatement of Torts of the American Law Institute, intentionally causing severe emotional distress to another is regarded as a tort (Hendrickson, 1982).

For many years, the common law in most states allows for the awarding of damages to parties who have proven that they have suffered emotional harm as a direct or indirect result of sustained physical injuries (Cohen, 1979). The element of physical injury has long been considered a necessary component of any valid suit involving the charge of inflicted emotional distress or mental injury. An opinion of the United States District Court (Ferrel v. Cheasapeake and Ohio Railway Employees Hospital Association, 366 F. Supp. 833 Virginia, 1971) cited William L. Prosser on the evolution of this relationship:

> Traditionally, the ability to recover damages for emotional distress has been limited to cases in which the plaintiff also suffered a contemporaneous physical injury. However, the trend in recent years has been to allow recovery for emotional distress which results from willful, wanton, intentional, or vindictive conduct (Prosser, Law of Torts 12 4th ed., 1971). According to Professor Prosser, the rule which seems to have emerged is that there is liability for conduct exceeding all bounds tolerated by a decent society of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind. (Prosser, supra., at p. 56).

When an individual is motivated by intent to harm another or realizes that his or her actions will surely yield certain harmful results, then that individual may be held liable for an intentional tort such as assault, battery, or the intentional infliction of emotional distress (Simon, 1982). Examples of so-called "quasi-intentional torts" would be fraud, defamation, and invasion of privacy.

The intentional infliction of emotional stress to a student would be difficult to prove because the school is popularly assumed to be a competitive place in which the student is "motivated" by negative as well as positive comments. The research on teacher-pupil verbal interaction clearly demonstrates that negative teacher comments are not correlated with pupil achievement gain. Abusive teacher verbal behavior toward students is common enough in the literature to be accepted as part of the school domain, but if harm can be proven as a result of it, it could be actionable. The proving of harm is very difficult, even if students are repeatedly called degrading names, or are defamed on their racial or ethnic membership, and their privacy is invaded for no reason. Such teacher behavior however, has been used as grounds for dismissal.

Interestingly, establishing liability for an intentional tort does not require the testimony of an expert witness (Simon, 1982). In suits involving the tort of negligence, expert witnesses are called. When intentionality is not regarded as a factor in a suit, attempting to demonstrate that psychological damage resulted from negligence on the part of a professional is a difficult task unless there is associated physical damage. In addition to this, four conditions must exist in a negligence suit before a cause of action can be established:

1. A duty to provide a standard of care must exist (as in the high standard in a physician-patient relationship);
2. there must be a dereliction of this duty;
3. there must be harm or damage as a result of a dereliction of duty; and
4. the dereliction of duty must be the proximate harm of the damage, or

Should any of these elements be lacking, there is no basis for a cause of action (Simon, 1982).

The physician is not deemed to be a curer but a practitioner. If the physician's instruction is followed, the patient has a cause of action, for negligence only if the

professional diagnosis or treatment were to be found negligent, that is not according to the accepted scientific procedures of the time the diagnosis or treatment were given. Not all diagnosis or treatment are successful in curing a patient. And indeed many have harmful affects. These affects are not actionable if the physician followed accepted scientific procedures which would have been used by most other physicians in the same or similar circumstances. The role of an expert witness in such a case is to testify as to whether the defendant did or did not exercise a reasonable standard of care, according to the facts of the case.

Even when a client is apparently suffering from both emotional distress and some physical injury, it is difficult for that person to demonstrate the connection between them. Most cases require that such a connection be established (Schwitzgebel & Schwitzgebel, 1980).

Continuing with the ruling of the United States District Court cited earlier, (Ferral v. Cheasapeake and Ohio Railway Employees Hospital Association, 366 F. Supp. 833 Virginia, 1971) it can be seen that once a connection between emotional distress and a physical illness is clearly indicated, then the principle of intentionality carries additional weight:

> If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is the legal cause, (a) although the actor has no intention of inflicting such harm, and (b) irrespective of whether the act is directed against the other or a third person (208 Va at 442, 158 S. E. 2d at 127).

Recently, however, damages have been awarded for the infliction of emotional distress as a result of negligence in the absence of physical injuries (Cohen, 1979). Time magazine (Time, May 31, 1976, p. 45-46) ran an article in 1976 which highlighted an illustrative case:

> A woman in her twenties was stopped by a security guard in a large Brooklyn department store because the guard thought that the woman had been an accessory to shoplifting. Despite the fact that the woman had no stolen merchandise in her possession, the guard took her to the local police precinct for booking. Subsequently, the woman brought suit for false arrest. At the trial, psychiatric testimony was adduced claiming that the woman was a "seriously ill young lady who has had a tenuous social and psychological equilibrium as a result of the events of October 23, 1972. She will require psychological and financial assistance for some time." The jury awarded the woman 1.1 million dollars in damages.

In the absence of elements such as intentionality, bodily harm, or subsequent physical illness, the suffering of emotional distress alone was sufficient to parley the false accusation of committing a five-finger discount into a seven-figure settlement.

More often than not, though, it is difficult to say with a reasonable degree of medical certainty that actual negligence caused mental injury. The plaintiff's task of proving the element of causation is simplified if it can be shown that the alleged negligence caused or encouraged the plaintiff "to sustain or inflict tangible physical injuries upon himself or others" (Rothblatt & Leroy, 1973; p. 264). Every successful suit in this area showed that relationship.

Trying to prove the element of damages when complaining of exclusively mental injuries is troublesome largely due to the current state of knowledge about mental illness (Rothblatt & Leroy, 1973). The speculative and intangible nature of various allegations made by an expert witness on behalf of a plaintiff are all open to attack during cross-examination. Aside from asking the expert witness how much money s/he is receiving for her/his testimony (i.e., implying that his opinion can be bought for the

right price), an opposing attorney can challenge the objectivity of an expert witness by questioning the adequacy of the examination he conducted as well as the validity of his conclusions and even the theoretical basis from which such an opinion is drawn. With so many different schools of thought within the field of mental health, "it is easy for an enterprising attorney to find professional literature that flatly contradicts almost any theoretical assumption on which an opinion may rest" (Gutheil & Appelbaum, 1982; p. 334). The task is made easier with the publication of guides which alert lawyers to relevant issues and controversies in the mental health field and which direct them to pertinent citations. Lately, mental health professionals have been familiarizing themselves with a book by Ziskin titled Coping with Psychiatric and Psychological Testimony, (Beverly Hills, CA: Law and Psychology Press, 1957). This resource has been helping potential expert witnesses anticipate challenges likely to be made against them and prepare counter arguments with recommended references (Gutheil & Appelbaum, 1982). No doubt there will be an arsenal of anti-Ziskin weapons emerging to balance the prosecution-defense equation. Judges and juries will have to endure elaborate displays of legal and psychological one-up-manship.

Depending on how you look at it, the legal system affords the expert witness a few advantages. First of all, an expert cannot be made to answer a quesiton with only a "yes" or "no" response if he feels that additional qualification is required. Secondly, a textbook or other published work may not be used to challenge the opinion of an expert witness unless that person actually relied upon a particular resource in formulating the opinion presented or otherwise acknowledged it as an authoritative work in the field (Gutheil & Appelbaum, 1982).

Implications for the Issue in West Virginia

Keeping all of this in mind, let us reconsider the West Virginia case for a moment. If the teacher did tie up children with rope, tape their mouths, and verbally abuse them, then it would strengthen the parents' suit if they could demonstate that

these actions were intentionally carried out by the teacher so as to inflict mental distress and that physical illness or bodily injury resulted. The children reportedly complained of headaches, stomach pains, and otherwise refused to go to school. However, there is nothing abnormal about such behavior and it would not serve well as evidence for damages in court. The statement made by the Temple University psychologist that the children underwent "a psychological holocaust" makes for good story-line in a newspaper, but in court, a great deal of elaboration clarifying the assessment would be required and the psychologist serving as an expert witness would face a stiff cross-examination.

What about the credibility of the children? According to a longitudinal study conducted by MacFarlane, Allen, and Honzik (1962), approximately 45 percent of children around five years of age lie to the extent that it is regarded as "problem behavior" by behavioral investigators. Such behavior is "relatively normal from a developmental perspective" (Reynolds, Gutkin, Elliott, & Witt, 1984; p. 109). We might therefore expect about half a classroom of first graders to be lying or fantasizing. It is easy to imagine what a defense attorney in this could do with the testimony of the West Virginia children.

We know that it is quite easy to get a positive or negative response from a very young child (ages 4-7) by simply phrasing the question and adding the emphasis that an adult wants. The standards of truth or falsity applied to very young children are apparently undergoing reexamination in courts. Many methods such as the use of anatomically correct dolls, remote TV monitors, video taped sessions with the child and the use of specially trained interviewers who avoid verbal pressure in certain directions are all being used in legal proceedings. These at the same time allow the children to present their testimony, yet protect them from the intentional hostility of cross-examinations which can easily force them into linguistic traps which make it appear that the child is lying. The standard of truth and falsity will undergo many changes in courts as the balance is struck between the need to determine a child's

accuracy and veracity and the need to protect the child from psychologically distructive verbal battering which attorneys are used to employing in courtroom combat, and which has so often in the past destroyed children's testimony.

Surely most people get a gut reaction when they first hear the description of a case like the one in West Virginia. How could such a thing happen? Children are so vulnerable; they require special protection by law. The teacher allegedly warned the children not to be tattle-tales. In the context of a classroom, that could be the only law a child is aware of. It is disconcerting to think that by outlawing corporal punishment we are leading teachers to become more creative about disciplining students - more psychologically-oriented rather than physical.

Even with well-intentioned and carefully worded statutes, plenty of abuse of all forms exists in schools. "Our society is ambivalent toward the child and young person, as evidenced by confusion and contradiction between rights bestowed and rights denied" (Costin, 1980; p. 160). To really get a grasp of this, we should take a look at how our legal system responds to cases involving severe corporal punishment. It is easy to get discouraged in waging a battle against the psychological abuse of children in school when we see how unsuccessful the battle against corporal punishment in schools has been.

The legal rights of children today are substantially different from those they had in the first half of this century. The schools before Tinker v. Des Moines were expected to function "in loco parentis" to the point where they were granted nearly total freedom in educating and socializing children (Reynolds, Gutkin, Elliott, & Wilt, 1984). This doctrine has weakened somewhat, but it still lingers in spite of attempts by courts and legislatures to limit its applicability (Fischer, Schimmel, & Kelly, 1981). U. S. Supreme Court is the T. L. O. opinion (53 U. S. L. W. 4083, U. S. January 15, 1985) further defined and limited this doctrine. Extension of the principle of egalitarianism has contributed more than anything else to the expansion of children's rights. Children are now supposed to have the same fundamental rights granted by the

Constitution to all "persons," and schools must respect this (Overcast & Sales, 1982). But it has been said that ". . . courts appear to have walked a fine line between granting students their constitutional rights and recognizing that schools must possess some latitude in imposing reasonable rules to maintain order and discipline so that the educational process can proceed in an orderly fashion" (Blackwell v. Issaquena County Board of Education, 1966 in Reynolds, Gutkin, Elliott, & Witt, 1984; p. 228).

There is a legal maxim known as "de minimis non curat lex" (the law does not deal with trifles). This is the attitude normally expected of legislatures and courts when it comes to the consideration of the rights of students facing disciplinary action for committing minor infractions of school rules. "Punishments" may include brief detention, extra work, verbal chastisement and so on. Overlooking the formalities of prerequisite due process in the course of such "trivial disciplinary matters" is the norm. School boards are expected to use their own discretion in determining what restrictions will be placed on student discipline in their own districts (Fischer, Schimmel, & Kelly, 1981).

It is paradoxical that even though children have been legally entitled to protection against abuse since legislation 1974, they have few legal rights when it comes to corporal punishment in school (Hare, 1980). The U. S. Supreme Court in 1977 in the case of Ingraham v. Wright ruled that only persons incarcerated in prisons are meant to be protected against Cruel and inhumane punishment under the Eighth Amendment. According to Justice Powell, such protection could not be invoked for children in schools. The court stated that school students were not entitled to any due process rights before corporal punishment was inflicted on them (Ingraham v. Wright, 420 U. S. 651, 1977). A generally well-accepted principle formed the basis for this decision - the very "openness of the public school and its supervision by the community afford significant safeguards against the kind of abuse from which the Eighth

Amendment protects the prisoner." Powell's intention was not to encourage abuse of children but to delegate to school boards and states the judgments about the application of physical control in classrooms.

Because corporal punishment is often seen as something done "for the good of the child," there has been a general reluctance to prohibit it. Parents who oppose the use of corporal punishment can do little to protect their children from it other than move to one of the six states, to District of Columbia or one of the school districts in the other states which have made it illegal. Seeing that New Jersey is one of the six might place a restriction on those who might be seriously considering following up on this option. In Pennsylvania, parents can in writing exempt their children from physical punishment, but in practice few parents know of or use this regulation. In all cases, exemption of children from physical punishment does not exempt students from bodily restraints force of the teacher believe there is a need to apply such restraints in an emergency.

Although corporal punishment in schools does not violate the prohibition against cruel and unusual punishment addressed in the Eighth Amendment, "excessive punishment might violate the substantive due process rights embodied in the Fourteenth Amendment" (Fischer, Schimmel, & Kelly, 1981; p. 205). In 1980 the Court of Appeals for the Fourth Circuit ruled along these very lines in the case of a young girl so severely paddled that she required ten days of hospitaliaation. The court held that a student's rights to substantive due process have been violated when evidence indicates that:

> the force applied caused injury so severe, was so disproportionate to the need presented and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience (Faye Elizabeth Hall, et al. v. G. Garrison Tawney, et al., 621 F. 2d 607 (4th Cir. 1980).

In other words, punishment which is outrageously excessive and unreasonable is required if courts are to intervene. Otherwise, legislatures and local school boards take care of the complaints about discipline (Fishes, Schimmel, & Kelly, 1981).

The American public's conception of child abuse is fairly clear and uniform except when it comes to fitting corporal punishment into the picture.

> The messages transmitted by society in this area are confusing if not contradictory. At this point in time, the line between severe and authorized corporal punishment and child abuse remains unclear (Anderson, Cramer, Foerster, & Lauderdale, 1979; p. 35-36).

The legal right of children to protection from maltreatment has been grounded in federal and state legislation in every jurisdiction of the country (Hare, 1980). At the federal level, the Child Abuse Prevention and Treatment Act (Public Law 93-247) was amended in 1978 to define "child and abuse and neglect" as follows:

> The physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of 18, or the age specified by the child protection law of the state in question, by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations presecribed by the secretary.

Legislative decisions at the state level have incorporated or modified definitions contained in the Model Child Protection Act published by the National Center on Child Abuse and Neglect in 1977 (Hare, 1980). Such child abuse statutes generally address physical abuse, mental injury, sexual abuse, neglect, and abandonment (Hare, 1980).

Charges of Verbal Abuse and Immoral Conduct

As has been noted earlier, much of this documented legal protection for children fades out of the picture when the hallowed glow of an orderly, well-disciplined school comes shining through. Physical abuse and its relevance to cases involving charges of psychological abuse have been discussed at length. Part of the allegations made in the West Virginia case included verbal abuse of the 15 first-graders. Courts have dealt with charges of immoral conduct and defamation of students by teachers in much the same manner as they have with charges of physical abuse.

Deciding whether the actions of a teacher might be construed as immoral conduct requires a certain amount of subjective judgment. The Supreme Court of Pennsylvania provided a broad, but by no means comprehensive, definition of immorality in 1939 - "immorality is not essentially confined to deviation from sex morality; it may be such a course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate" (Horosko v. Mt. Pleasant Township School District, 335 Pa. 369, 1939). Currently, charges of immorality in teacher dismissal cases correspond directly to an individual's fitness to teach (Francis & Stacey, 1977).

Certain kinds of discipline have been observed by courts as being examples of poor judgment (Valente, 1980). In a court case heard in Louisiana in 1973, a male teacher was discharged by his school board because he punished 11-year-old girls who used a vulgar term during recess by having them write the work 1,000 times. Supposedly this type of punishment was a standard procedure in the school and the teacher complained that he did not receive fair warning that his conduct would be grounds for his dismissal. The court upheld the discharge. Forcing children to repetedly write vulgar terms in the presence of their classmates reflected "extremely poor judgment" according to that court (Celestine v. Lafayette Parish School Board, 284 so. 2d 650 La., 1973).

What about charges of verbal abuse of students during discipline? Defamatory statements made about a student might be regarded as verbal abuse. However, there have been few court cases involving libel (defamation in a written form) or slander (defamation expressed by word of mouth) in education according to Burgum and Anderson (1975).

The necessary elements for a tort of libel and slander are:

1. a false statement concerning another was published or communicated;
2. the statement brought hatred, disgrace, ridicule or contempt on another person;
3. damages resulted from the statement. (Alexander, Corns, & McCann, 1969; p. 325)

Ridicule and verbal abuse of students are frequent in schools largely because courts and school boards have not found them to be actionable, and parents have not challenged them. Accordingly, "a teacher's statements are subject to a qualified privilege if they are made as a part of the teacher's professional responsibility" (Fischer, Schimmel, & Kelly, 1981; p. 94). The Supreme Court of Georgia agreed with a lower court decision regarding the conditionally privileged nature of certain statements and invoked the concept of in loco parentis as support for this:

> The parent-child relationship very closely parallels that of . . . faculty and students in matters of discipline, discovering misconduct and punishing therefor. Any legal restraint of either parent or faculty in the reasonable discharge of duty not only would not be beneficial to the child or student but might well be disastrous to them.
>
> Walter v. Davidson, 102 S.E.2d 686 (Ga. App. 1958), rev'd. 104 S.E. 2d 113 (Ga. 1958) .

Statements made by a teacher in the course of disciplinary or administrative responsibility might therefore be regarded as conditionally privileged.

Concluding Remarks

The one thing that the parents and children have going for them in their suit against the West Virginia school teacher is the shock value of the allegations. Had the teacher "only verbally abused" the children, then chances are that no legal action would have been possible. But who is to say that the verbal abuse wasn't the most detrimental part of the children's experience? A small child seated in the confines of a classroom confronted with an authority figure who warns him or her not to be a tattle-tale is as effectively bound and gagged as if the teacher used rope and tape. Do we always need physical props to get our attention?

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